UNITED STATES DEPARTMENT OF LABOR
Board of Alien Labor Certification Appeals
WASHINGTON, D.C.

'Notice: This is an electronic bench opinion which has not been verified as official'

Date: August 4, 1997

Case No: 95 INA 285

In the Matter of:

JERZY KARMILOWICZ,
Employer,

On Behalf of

ZOFIA SZCZUR,
Alien

Appearance: P. W. Janaszek, New York, New York

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Zofia Szczur (Alien) by Jerry Karmilowicz (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, (DOT) published by the Employment and Training Administration of the U. S. Department of Labor.

of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On March 31, 1994, the Employer applied for labor certification to permit him to employ the Alien on a permanent basis as a "Cook Kosher" to perform the following duties in his household:

> Prepares, seasons, and cooks soups, meats, vegetables, etc. according to the principles of Kosher cuisine. Bakes, broils, and steam meat, fish and other food. Prepares Kosher meats such as Kreplach, Stuffed Cabbage, Matzo Balls. Decorates dishes according to the nature of celebration. Purchases foodstuff and accounts for the expenses incurred.

The work week was forty hours from 9:00 AM to 6:00 PM with no overtime at the rate of $12.48 per hour. The position was later classified as "Cook (Household)(Live-Out), under DOT Code No. 305.281-010. The application (ETA 750A) indicated as education requirements the completion of elementary and high school, and further required that applicants have two years of experience in the Job Offered. The Alien met both the educational and experience qualifications as she was a high school graduate and had worked from March 1990 to March 1994 as a "Cook, kosher" in a residence in Brooklyn, N. Y. AF 01-04.[2] In an addendum to the application, the Employer stated that, "Due to religious considerations meals must be prepared in accordance with principles of Kosher cuisine." The cooking would be performed for the members of the Employer's household, which consists of the Employer, his wife, their two sons (ages 10 and 12), and his mother-in-law. AF 05, 28. Although the job was duly advertised, no response was received. The State employment office commented that, "This does not logically appear to be a 'full-time' job offer for household cook as only full time employee." AF 20.

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[2]The duties performed in this position were virtually identical to those listed in the Employer's portion of this application. The employment apparently ended in the same month as this application was filed.

Notice of Findings. On August 31, 1994, a Notice of Findings (NOF) by the CO advised that certification would be denied unless the Employer corrected the defects noted. The CO said Employer's application failed to establish that the position at issue was permanent full time employment in this two person household within the meaning of the Act and regulations after considering the application.[3] The CO required that this finding be rebutted with evidence that the job constitutes full-time employment as defined in the act and regulations and was customarily required by the Employer. The CO then listed the evidence required for the Employer to prove that the job offered is a full time position. The data required was stated in the form of requests for specific facts and for responses to explicit questions, all of which were designed to draw out collateral information that addressed this issue. AF 21-22.

Rebuttal. On July 26, 1994, the Employer filed a rebuttal in which he described his need for the services of a cook to shop for food and prepare meals according to principles of "Kosher cuisine," of which the Employer observed that, "It is our necessity that the cook is familiar with the Jewish dietary laws. AF 28. The Employer answered the CO's inquiries with a detailed schedule of the time and functions performed by his wife in assembling, preparing, serving, and cleaning up after the family meals. As to the kosher food requirement, he explained,

> As I have stated, we are of Jewish origin and, due to our religious background, it is necessary that meals are prepared according to the Kosher fundamentals. Enclosed please find a letter confirming that we have been members of Congregation Jatevlev for over 12 years, which serve as an evidence supporting the kosher food experience requirement in our household. All members of our congregation are required to follow principles of our religion. We have always obeyed and followed the principles of our religion in all aspects of our life.

AF 26. The Employer's need for a cook arises from his wife's participation in his construction business, which began when his mother-in-law assisted them in the past. This ended when his mother-in-law became ill and was unable to do the work, resulting in his wife's return to the kitchen. AF 30.

Final Determination. On October 7, 1994, the CO denied

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[3]The CO cited 20 CFR § 656.50, but there is no such regulation. It is assumed that the CO meant to refer to the definitions for this part at 20 CFR § 656.3, which contain the following: "Employment means permanent full time work by an employee for an employer other than oneself. For purposes of this definition an investor is not an employee."

certification on grounds that the Employer failed to prove that the position was full time employment in the Employer's household and has been customarily required in his household, finding that the rebuttal failed to establish that the job constitutes full time employment or that the position is "a customary rquirement."[4] The CO first noted that the Employer "states that he has not customarily required the services of a live-in cook." Second, the CO found Employer's representative schedule "unrealistic," explaining its deficiencies at length. Finally the CO found that the Employer had not established that the position, "absent any other houseworker, entertainment, or child care duties," constitutes full time employment, adding

> It would appear rather, that an effort is being made to qualify the alien under the "Skilled Worker" category because of the unavailability of visa numbers in the "Other Worker" category of employment based preferences.

AF 32-33. Certification was then denied.

Employer's appeal. In appealing from the CO's denial of certification the Employer first observed that the rebuttal established "business necessity" for hiring live-out domestic cook, taking issue with the CO's reliance on the criteria of proof for a live-in cook, noted supra. The Employer then took issue with the CO's finding "unrealistic" the schedule of the time required to perform the work of the position at issue. In particular the Employer disputed the CO's apparent use of a criterion that entertainment was an essential ingredient for proof of eligibility for certification, notwithstanding the job description for the position of "Cook (Household)(Live-Out), under DOT Code No. 305.281-010. The Employer remonstrated that the conclusion stated in the CO's FD was based on criteria that were inconsistent with the regulations in that the CO asserted that his application was an effort "to qualify the alien under the 'Skilled Worker' category because of the unavailability of visa numbers in the 'Other Worker' category of employment based preferences." The Employer argued that his estimate of the time required to do the job was realistic and the CO's evaluation was not. Employer then requested the review of the CO's denial of certification in the FD. AF 42-43.

DISCUSSION

The CO decided this application primarily on the evaluation of the Employer's responses to the NOF as to whether or not the

[4]The CO again cited 20 CFR § 656.50, which is 20 CFR § 656.3, as supra.

job was a permanent full time position of employment. After comparing the Employer's rebuttal and his argument appealing from the denial of certification, it appears that the Employer did establish that the duties of this household cook are sufficiently substantial to occupy an eight hour day of work in the Employer's kitchen, based on the evidence of record. In this case the CO does not appear to have given appropriate weight to Employer's representations, even though it is well established that statements by an employer shall be considered documentation under the regulations. Where the statements are reasonably specific and identify their bases, the CO must weigh and consider such documentation and give it the weight it rationally deserves. **Gencorp**, 87-INA-659 (Jan. 13, 1988), as cited in **Central Michign Community Hospital**, 89-INA-116(Jan. 31, 1990).

It appears, moreover, that the Employer was also required by the NOF and FD to establish the "business necessity" of this job. The CO was mistaken, since the Employer is not required to prove the business necessity for the position offer, itself, if a bona fide job does exist. **Abedlghani and Houda Abadi** , 90-INA-139 (June 4, 1991).[5] Consequently, while the CO initially said that certification would be weighed on proof of the existence of a permanent full time position, the CO's closing remarks, which were protested in the Employer's appeal, strongly suggest that the evidence of record was weighed under criteria that were neither stated nor justified by either the regulations or the record of this proceeding. It is more significant that the CO mistakenly assumed that the position offered was for a Cook (Household) (Live-In) and apparently decided certification on that basis, even though the application and the rebuttal clearly stated that the job offer at issue was for a Cook (Household) (Live-Out).

For all of these reasons it is concluded that the issue of certification was incorrectly decided on the evidence of record, and that the file should be remanded for reconsideration for the reasons discussed above.[6]

Accordingly, the following order will enter.

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[5]Also see **Hubert Peabody,** 90-INA-230 (Apr 30, 1991); **Joon Sup Park,** 89-INA-231 (Mar. 25, 1991); **Shinn Shyng Chang,** 88-INA-028 (Sept. 21, 1989); **Timmy Wu,** 87-INA-735 (June 28, 1988).

[6]The panel disagrees with the concurring member, as the the Employer's rebuttal clearly presented sufficient evidence to establish the business necessity for experience as a kosher cook within the meaning of **Teresita Tecson**, 94-INA-014(May 30, 1995), and the other relevant cases cited.

ORDER

The Final Determination denying certification under the Act and regulations is hereby set aside and this file is remanded to for reconsideration by the Certifying Officer for the reasons herein above set forth.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case No: 95 INA 285

JERZY KARMILOWICZ, Employer,
ZOFIA SZCZUR, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: May 8, 1997